IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.781 of 2004.
in
SECOND APPEAL (ST).12585 OF 2004.

1. Dayabhai Narsibhai Rathod,
since deceased

2. Surendrasingh Dayabhai Rathod ...Applicant

versus

Narpatsingh Dayabhai Rathod ..Respondent.

Mr.B.A.Vora for the Applicant

Mr.L.M.Kothari for the Respondent

Coram : S.R.Sathe, J.
Dated : 22nd Feb., 2006

P.C.

1. Applicant, the original defendant in Regular Civil Suit No.9 of 1987 has filed this application to condone delay of 2years 301 days in filing the second appeal.

2. It is the case of the applicant that Narpatsing Dayabhai Rathod, the brother of applicant Surendrasingh Rathod filed suit for perpetual injunction against the applicant. The said suit was dismissed. Being aggrieved, Narpatsing, the original plaintiff filed Regular Civil Appeal No.2 of 1998 in the Court of District Judge, Dadra and Nagar Haveli. The said appeal was allowed by the

first appellate court on 28.2.2001 and decree for permanent injunction was passed against the applicant. According to applicant, when the first appeal came up for hearing they were not informed by their lawyer and as such they could not remain present on the date of hearing. Their lawyer also did not attend the date of hearing. So they did not come to know as to when the said appeal was decided. On 28.10.2001 the minor son of the applicant expired and as a result of the same he could not contact his lawyer. However, after gap of so many months the applicant came to know about the decision of the appeal, but thereafter Dayabhai i.e. the original Defendant No.1 died on 28.9.2002. After that the applicant and respondent decided to settle their quarrel by compromise in presence of panchas. It was decided that the respondent, original plaintiff will not take further steps for execution and as such the appellant did not file the appeal, thus there was delay. According to applicant there is sufficient cause to condone the said delay of 2 years 301 days.

3. The respondent filed his affidavit and opposed the application. It is contended by the

respondent that the applicant has not at all given any sufficient cause for the delay in filing the appeal. The delay of 2 years and 301 days is not at all explained by the applicant. Moreover, it is not correct to say that the applicant was not aware of the decision of the First Appeal. According to the respondent, after the decision of the appeal he filed execution proceeding on 5.11.2001. Notice of the said execution proceeding was served on the applicant and he appeared in the said proceeding on 5.2.2002. Not only that, but he sought time to file reply and then filed reply on 14.11.2002. Thus, according to respondent the applicant was fully aware of the dismissal of the suit and there was absolutely no reason for him in not filing the second appeal in time. He, therefore, requested that the application be dismissed.

4. I have heard both the learned Advocates. The only point which falls for my consideration is whether the applicant has shown that there was sufficient cause for him in not filing the second appeal in time. It is necessary to see whether the delay of two years and 301 days is satisfactorily explained by the applicant. My answer to the above

question is in the negative for the following reasons.

5. At the outset it must be mentioned that the application filed by the applicant is very vague. Though he has averred in the application that he was not aware about the date of hearing of the first appeal and his lawyer had not informed the said date, and that the lawyer was also absent on the date of hearing, he has not filed affidavit of his advocate nor he has produced any other satisfactory evidence to show that his advocate had not informed him about the date of hearing. Apart from that what is material is whether the applicant had come to know about the decision of the appeal and if so when. In this behalf also the applicant has skilfully avoided to give any specific date or even month as to when he came to know the decision of the first appeal. So this itself shows that there is absolutely no substance in the stand taken by the applicant.

6. The respondent has stated in his affidavit that after the decision of the appeal he started

execution proceeding and in that the applicant had in fact appeared on 5.2.2002. Not only that, even on the subsequent days also he was present in the Court. So, it is not that he was not attending the court proceeding. It is true that the applicant's son expired on 28.10.2001 and his father expired on 28.9.2002, but from the above mentioned facts it is very clear that even after the death of his son he had appeared in the execution proceeding. Similarly, even after the death of his father he had appeared in the said proceeding. So, it is very clear that in order to gain sympathy the applicant has given lame execuse that due to the death of his son and father he could not file the appeal in time. The learned Advocate for the respondent has placed on record the certified copy of the roznama of the execution proceeding. From the perusal of the same also it is very clear that even after the death of son and father the respondent was attending the execution proceeding and contesting the same. So, I have absolutely no hesitation to hold that the grounds mentioned in the application for not filing the appeal in time are not at all true and correct.

5. It is tried to be suggested by applicant

that some settlement talks were going on and as such he did not file the appeal. But, for this also besides the bare interested word of the applicant there is no other evidence. in fact he has stated in his rejoinder that the agreement with regard to compromise was also reduced in writing and that he would produce the said writing. But, admittedly, no such writing is produced in this Court. So, this also shows that the stand taken by the applicant is not true and correct. It is really very difficult to believe that the applicant, if really he had intention to file the appeal against the decision he would keep mum for a period of about two years and 301 days. Thus, it is quite evident that the applicant has miserably failed to show that there was sufficient cause for him in not filing the appeal in time. He has not at all given satisfactory explanation about the delay. The application is therefore dismissed.

. The applicant to pay cost of Rs.1000/- of this application to the respondent.

. The death extract produced by the respondent is allowed to be withdrawn.

(S.R.Sathe, J.)